

**UNITED STATES PATENT AND TRADEMARK  
OFFICE**

Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451

Butler

**Mail date: March 17, 2005**

**Opposition No. 91160218**

**Royal Caribbean Cruises, Ltd.**

**v.**

**Royal Caribbean Jamaican  
Bakery, Inc.**

**Before Holtzman, Rogers and Drost, Administrative Trademark  
Judges.**

**By the Board:**

Applicant seeks to register the following mark



for "Jamaican style baked goods, namely breads, cakes, rolls, muffins, puddings, tarts and buns."<sup>1</sup>

In its amended notice of opposition, opposer alleges that applicant's mark so resembles opposer's previously used and registered marks as to be likely to cause confusion, mistake or to deceive. Opposer pleads ownership of the following registered marks: ROYAL CARIBBEAN for "arranging and conducting cruises for

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<sup>1</sup> Application Serial No. 76487000, filed on February 3, 2003, claiming use and use in commerce since December 15, 1980, and disclaiming the term CARIBBEAN BAKERY apart from the mark as shown.

others";<sup>2</sup> ROYAL CARIBBEAN CRUISES LTD. for "cruise ship services: transportation of passengers by ship";<sup>3</sup> ROYAL CARIBBEAN for a wide variety of goods in multiple international classes;<sup>4</sup> and



for "cruise ship services; arranging and conducting cruises for others; transportation of passengers by ship."<sup>5</sup>

In addition, opposer alleges that the doctrine of *res judicata* precludes issuance of a registration to applicant for the subject application. More specifically, opposer alleges that the parties were previously involved in an opposition before the Board over applicant's then pending application Serial No. 75386136 for the following mark

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<sup>2</sup> Registration No. 1397148 issued on June 10, 1986, claiming use and use in commerce since January 13, 1970, and disclaiming CARIBBEAN apart from the mark as shown. Section 8 affidavit accepted, Section 15 affidavit acknowledged.

<sup>3</sup> Registration No. 1667873 issued on December 10, 1991, claiming use and use in commerce since November 14, 1989, and disclaiming CARIBBEAN CRUISES LTD. apart from the mark as shown. First renewal.

<sup>4</sup> Registration No. 1817745 issued on January 25, 1994, claiming various first use and first use in commerce dates depending on the particular class of goods. For example, the date of first use and first use in commerce for "pocket knives" is claimed as August 1, 1991; for "beach towels," January 6, 1990; and for "Christmas tree ornaments, aerodynamic disks for use in playing catching games, toy model ships, and stuffed toys," the claimed date of first use is December 2, 1986 and the claimed date of first use in commerce is July 1, 1991. First renewal.

<sup>5</sup> Registration No. 2408022 issued on November 28, 2000, claiming first use and first use in commerce since June 1997, and further claiming acquired distinctiveness pursuant to Trademark Act Section 2(f) with respect to CARIBBEAN INTERNATIONAL.



for "bread, buns, cakes, rolls, pastries, and bread dough."

Opposer alleges further that the previous opposition was sustained, and that the mark and goods in applicant's present application are substantially identical to the mark and goods in applicant's previous application.<sup>6</sup>

In its answer, filed on June 7, 2004, applicant denies the salient allegations of the amended notice of opposition, clarifying that its denial with respect to the claim of *res judicata* is "...to the extent Application Serial No. 75386136 was successfully opposed on the merits." Applicant also asserts certain affirmative defenses.

In a decision dated September 16, 2004, the Board considered and denied applicant's then pending motion to set aside the prior judgment in Opposition No. 91113388. In the earlier proceeding between the parties, applicant, after filing an answer, filed an "express abandonment" of its then pending application Serial No. 75386136. Inasmuch as such abandonment was made without the written consent of the opposer, the Board sustained the opposition, entering judgment against the applicant and refusing

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<sup>6</sup> The earlier opposition referenced by opposer is Opposition No. 91113388. In the prior and current oppositions, opposer has alleged, as an element of its likelihood of confusion claim, that it serves the baked items identified by applicant in its applications to the passengers aboard its ships.

registration to applicant of its mark. See Trademark Rule 2.135; and TBMP §602 (2<sup>nd</sup> ed. rev. 2004).

This case now comes up on opposer's fully-briefed motion, filed November 19, 2004, for summary judgment in its favor based on the ground that the judgment in Opposition No. 91113388 bars registration of applicant's mark in the present case.

In a motion for summary judgment, the moving party has the burden of establishing the absence of any genuine issue of material fact and that it is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56. A genuine dispute with respect to a material fact exists if sufficient evidence is presented that a reasonable fact finder could decide the question in favor of the non-moving party. See *Opryland USA Inc. v. Great American Music Show, Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992). Thus, all doubts as to whether any particular factual issues are genuinely in dispute must be resolved in the light most favorable to the non-moving party. See *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ 1542 (Fed. Cir. 1992).

Under the doctrine of claim preclusion (*res judicata*), the entry of a final judgment "on the merits" of a claim (i.e., cause of action) in a proceeding serves to preclude the relitigation of the same claim in a subsequent proceeding between the parties or their privies, even in those cases where the prior judgment was the result of a default or consent. See *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1955); *Chromalloy American Corp. v. Kenneth Gordon, Ltd.*, 736

F.2d 694, 222 USPQ 187 (Fed. Cir. 1984); and *Flowers Industries, Inc. v. Interstate Brands Corp.*, 5 USPQ2d 1580 (TTAB 1987).

Turning now to the specifics of this case, in support of its motion, opposer argues that the judgment against applicant in the previous opposition, where applicant abandoned its application without opposer's written consent, bars applicant from now registering its mark. Opposer argues that the present situation is the same as that considered in *Miller Brewing Company v. Coy International Corporation*, 230 USPQ 675 (TTAB 1986), where the applicant in the first opposition between the parties abandoned its application without the opposer's written consent, barring applicant, under the principles of *res judicata*, from registering what was determined to be the same mark in the second opposition between the parties, both applications being for "beer."

In response, applicant argues that the present situation is distinguishable from the facts of *Miller Brewing, supra*, and more akin to *Metromedia Steakhouses Inc. v. Pondco II Inc.*, 28 USPQ2d 1205 (TTAB 1993), where applicant's two marks involved in two different oppositions with the same opposer were determined to be distinctly different; the mark in the earlier application, which was expressly abandoned without opposer's written consent, being the words RANCH STEAK & SEAFOOD, and the mark in the second application being a western design, including cactus with the stylized words RANCH STEAK & SEAFOOD superimposed thereon, with the word RANCH larger, and over the words STEAK & SEAFOOD.

More specifically, applicant contends that the mark it now seeks to register is physically different, thus conveying a different commercial impression, from the mark it sought to register in the earlier opposition. In addition, applicant contends that the goods identified by its present application are substantially different from the goods identified in its previous application. Consequently, according to applicant, the evidence opposer would have had to present in opposing applicant's first application differs from the evidence opposer should expect to submit in this case on the likelihood of confusion claim. In comparison, applicant argues that the applicant in *Miller Brewing* sought to register the same mark both times for the same goods, beer, thus necessitating in theory the presentation of the same evidence in both cases on the likelihood of confusion claim.

In comparing its marks, applicant contends that its first mark is composed of stylized lettering embedded in a banner with a crown sitting atop the banner, and is lined for the colors red and gold; while its second mark is composed of stylized lettering embedded in a colorless banner with the crown somewhat submerged in the banner. In addition, applicant argues that the two banners differ in size, design and style and the lettering in each of its marks differs in font style. Applicant further argues that the identification of goods in its first application was broad ("bread, buns, cakes, rolls, pastries, and bread dough"), while the identification of goods in its present

application is extremely narrow ("Jamaican style baked goods, namely breads, cakes, rolls, muffins, puddings, tarts and buns").

Notwithstanding applicant's arguments to the contrary, the mark applicant now seeks to register is virtually identical to the mark it sought to register previously, and that it abandoned without the written consent of opposer in the earlier opposition. Applicant's two marks convey the same commercial impression: a regal banner proclaiming the words ROYAL CARIBBEAN BAKERY. The banners, though not duplicates, are substantially the same in shape. Applicant does not claim color for its present mark, as it did for the earlier mark. Thus, the present mark is not limited by color and may be presented in any color combinations at applicant's discretion, including red and gold, the colors claimed previously. The crowns are located in the same place on each banner and, but for the color lining in the first mark, are otherwise the same in position and shape. The different fonts in each mark for the word portions of the mark do not create different commercial impressions for the words or for the overall marks. Consequently, the minor alterations in the second mark, as compared to the first mark, do not create a new mark sufficient to allow applicant to seek registration in view of the earlier judgment.

With respect to applicant's goods set forth in each application, the identification of goods in the first application is broad and encompasses the narrower identification in the second application. That is, most of the items in both

applications are the same (bread, buns, cakes, rolls). The restriction in the present application that the goods are to be of Jamaican type does not aid applicant because, to the extent the identifications list the same items, the identification in the earlier application was unrestricted and has to be read to encompass the identified baked goods of all types, including the Jamaican type. *See, for example, Domino's Pizza Inc. v. Little Caesar Enterprises Inc.*, 7 USPQ2d 1359, 1366 n. 10 (TTAB 1988). With respect to "tarts," identified distinctly in the present application but not in the prior application, such goods are encompassed by the earlier application's listing of "pastries." A "tart" is defined as follows: "1. a small shell of pastry filled with jam, jelly, etc. 2. in England, a small pie filled with fruit or jam and often having a crust top."<sup>7</sup> As to "muffins," identified in the present application but not in the prior application, such goods may be considered "breads" and are otherwise so similar in nature to the goods identified in the first application that the earlier judgment would be binding. A "muffin" is defined as follows: "a quick bread made with eggs, baked in a small cup-shaped mold and usually eaten hot."<sup>8</sup> Lastly, "pudding," identified in the present application but not previously, is encompassed by the term "pastry." "Pudding" is

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<sup>7</sup> *See Webster's New World Dictionary of the American Language* New York: Simon & Schuster (2<sup>nd</sup> College ed. 1982) at p. 1456. The Board may take judicial notice of dictionary definitions. *See, for example, University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co.*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

<sup>8</sup> *Id.* at p. 934.



defined, in part, as follows: "3. a sweetened dessert of this kind, made as with rice or soaked bread, and variously containing eggs, milk, fruit, etc."<sup>9</sup> However, even if "pudding" is not a pastry here, and this single item presents a new question, because it is embedded in the identification of the second application that lists many of the items from the prior application, the refusal must apply to the entire identification. Moreover, an applicant cannot void the estoppel effect of the decision of a prior disposition by insignificantly changing its identification of goods. *See Domino's Pizza Inc. v. Little Caesar Enterprises Inc.*, 7 USPQ2d 1359, 1366 n. 10 (TTAB 1988).<sup>10</sup>

There is no dispute that the parties to this opposition are the same as the parties in the earlier opposition.

An applicant that abandoned its prior application without the written consent of the adverse party is barred by *res judicata* from seeking to register a substantially identical mark for the same goods. *See Aromatique Inc. v. Lang*, 25 USPQ2d 1359 (TTAB 1992); and *Miller Brewing Company v. Coy International Corporation*, 230 USPQ 675 (TTAB 1986).

In view thereof, no genuine issue of material fact exists, and opposer is entitled to judgment as a matter of law on its

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<sup>9</sup> *Id.* at p. 1149.

<sup>10</sup> The Board notes, too, that the doctrine of *res judicata* is applicable in an opposition proceeding where an applicant may be seeking to register the same mark at issue in prior proceeding not only with respect to an identical description of goods as had been previously litigated, but with respect to all goods that could be said to be encompassed by that description, at least where applicant was actually using its mark at the time of the prior proceeding. *See General Electric Company v. Raychem Corporation*, 204 USPQ 148 (TTAB 1979).

claim of *res judicata*. Accordingly, opposer's motion for summary judgment is granted; the opposition is sustained; judgment is entered against applicant; and registration to applicant is refused.<sup>11</sup>

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<sup>11</sup> In view of our decision herein, applicant's motion, filed November 1, 2004, to compel opposer's responses to applicant's discovery requests need not be considered.